IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 41 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

JASHODABEN FAKIRCHAND THAKKAR

Versus

JAYANTIBHAI BHAILALBHAI PARIKH

Appearance:

MR BM MANGUKIYA for Petitioner

Mr.K.C.Shah, A.P.P. for Respondent No. 2

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 14/09/2000

ORAL JUDGEMENT

1. This revision is directed against the Judgment and order dated 27.1.2000 rendered by Additional Sessions Judge, Court No.9, Ahmedabad, dismissing the Appeal of the revisionist.

2. List has been revised thrice, but none appeared for the revisionist. As such the Judgment under Appeal has been examined so also Shri K.C.Shah, learned A.P.P. has been heard.

3. Brief facts giving rise to this revision are as under :

The respondent No.2, complainant, filed complaint u/s.138 of the Negotiable Instruments Act, 1881 (for short "The Act") against the revisionist and her husband - accused No.2 Fakirchand Thakkar, alleging that the cheque was issued on 15.12.1993 by the two accused in favour of the complainant for a sum of Rs.1,00,000/-. The accused were running Chit Fund scheme. The complainant was induced by the two accused to join the scheme upon which he invested Rs.50,000/- each in the two schemes. The schemes were completed in October, 1993 and as such Rs.1 lac were deposited with the two accused by the complainant. The complainant was never paid any money or bonus under the scheme. On demand a cheque of Rs.1 lac was issued by the two accused on 15.12.1993. It was drawn on Co.Operative Bank Ltd., Khadia Branch, Ahmedabad. The said cheque was deposited with the bankers on 7.5.1994 which was dishonoured with remarks "insufficient fund". Thereafter notice was issued to the two accused, but no reply was received hence a complaint was filed.

4. Both the accused were tried by the Metropolitan Magistrate, Ahmedabad, who acquitted the husband of the accused No.1, namely, Fakirchand Thakkar. The accused No.1, viz. Jashodaben Thakker, the revisionist, was convicted and sentenced to under-go one year's Simple Imprisonment and to pay fine of Rs.1,50,000/- and indefault of payment of fine to under-go further Simple Imprisonment for six months. An Appeal was preferred by the revisionist which was dismissed on 27.1.2000. The instant revision has been filed against the said order of the Appellate Court.

5. Since nobody appeared from the side of the revisionist the Judgments of the two courts below were examined and considered and Shri K.C.Shah, learned A.P.P. representing the respondent No.2 was heard. None appeared on behalf of the respondent No.1 complainant.

6. The order of acquittal of Fakirchand Thakkar recorded by the trial Court is not under challenge nor it can be under challenge in this revision. Consequently

that order requires no reconsideration.

7. So far as the revisionist is concerned, namely, Jashodaben Fakirchand Thakkar, she has been convicted under Section 138 of the Act and has been sentenced to under-go Simple Imprisonment for one year and to pay fine of Rs.1,50,000/- and indefault of payment of fine to undergo further simple imprisonment for a period of six months.

8. I do not find any merit in the attack that the ingredients of Section 138 of the Act are not made out. Section 138 of the Act reads as under :

> "138. Dishonour of cheque for insufficiency, etc. of funds in the account - where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque, or with both."

9. In the instant case cheque was drawn by the revisionist. It was signed by her. It was a partnership firm which was running Chit fund business in which the revisionist and her husband were partners. The business of partnership was run in the name of Khodiar Vastra Bhandar. The account in the bank was also in the name of Khodiar Vastra Bhandar and this account was operated by the revisionist. Thus, the account was maintained by the revisionist with the Bank in the name of Khodiar Vastra Bhandar. She was also author of the cheque. The cheque was issued to the complainant in discharge of liability of Khodiar Vastra Bhandar, for the amount received from the complainant towards chit fund scheme. It was thus in the nature of discharge of liability of the Khodiar Vastra Bhandar, for which the cheque was issued by the revisionist. The revisionist was also styled as Sole Proprietor of the said business. This has been so observed by the lower Appellate Court. If she was acting

as sole proprietor and issued cheque for and on behalf of Khodiar Vastra Bhandar to discharge her liability as well as the liability of the sole proprietorship concern it can be said that the ingredients of Section 138 of the Act were fulfilled. There is no dispute that the cheque was dishonoured on account of insufficient fund for its payment.

10. The two Courts below have rightly not believed the version of the revisionist that she had signed the cheque under the instructions of her husband Fakirchand Thakkar. If it was the sole proprietorship concern of the revisionist she had no reason to sign the cheque on the instructions of her husband. It is immaterial that she is Hindu wife and acted under the instructions of her husband. This cannot be a ground for escaping the liability by the revisionist. Obviously the liability was in the name of Khodiar Vastra Bhandar and not in the name of particular individual. The revisionist was the sole proprietor of the said concern and as such she was held liable by the trial Court as well as by the lower Appellate Court. Acquittal of husband of the revisionist is therefore no ground for acquitting the revisionist also. Since the offence u/s.138 of the Act was established against the revisionist beyond all shadow of doubt the Courts below have not committed any illegality in convicting and sentencing the revisionist for the aforesaid offences.

11. The statement of officer of the Bank, namely, Bharatbhai was also rightly believed by the Courts below. This witness had stated from the document that the account was in the name of Khodiar Vastra Bhandar and the accused No.1 was the sole proprietor, operating the said account. There was no transaction between the complainant and the accused No.2 Fakirchand Thakkar. The question whether the chit fund transaction is legal or illegal transaction, on the facts of the case, can be no ground for ignoring the legal liability of the revisionist. The amount was received by the revisionist from the complainant and it was obviously in the nature of liability to repay the same along with bonus after completion of the scheme to the complainant. The cheque was issued in discharge of such liability by the revisionist. After completion of the scheme the liability of the revisionist was to repay the deposit with bonus but the cheque was issued in part discharge of the liability inasmuch as bonus was not paid. Thus the cheque was issued to the complainant in discharge of part of the liability by the revisionist hence ingredients of Section 138 of the Act are duly made out.

12. The plea of the revisionist that it was a partnership concern was not established and the Courts below found that Khodiar Vastra Bhandar was the sole partnership concern of the revisionist, viz. Jashodaben. As such there is no ground for interference with the findings of the lower Appellate Court confirming the findings of the trial Court that the offence u/s.138 of the Act was established against the revisionist beyond all shadow of doubt.

13. On the point of sentence nobody is present on behalf of the revisionist to argue that the sentence is harsh and lenient view is required to be taken. The question of reduction of sentence was considered by the lower Appellate Court. The Lower Appellate Court observed that the accused No.1, namely, the revisionist is a poor aged lady. However, keeping in view the seriousness of the offence committed by her the lower Appellate Court was not inclined to interfere with the sentence awarded by the trial Court.

14. However, I find that it is a case where maximum sentence of one year's Simple Imprisonment to old lady who, according to the Appellate Court, is also a poor lady, seems to be severe. No reason has been given why maximum sentence of one year's imprisonment was awarded in this case. It was not one of the rarest of rare cases where maximum sentence should have been awarded.

15. Likewise the fine imposed is also severe. Fine in the sum of Rs.1,50,000/- has been imposed, whereas the amount of cheque was Rs.1,00,000/- only. Section 138 of the Act does not prescribe that in every case fine which may extend to twice the amount of the cheque must be imposed. The word "may" in the section indicates that it is discretionary for the Court to impose maximum fine extending twice the amount of the cheque, but it is not always obligatory to impose fine to the extent twice the amount of the cheque.

16. Looking to the penalty imposed upon the revisionist and her old age I feel that three month's Simple Imprisonment will meet the ends of justice. The amount of fine of Rs.1,50,000/- can also be reduced to Rs.1,25,000/- which should normally meet the ends of justice. Out of the fine so realized a sum of Rs.1 lac shall be paid to the complainant - respondent No.1 and the remaining amount shall go to the account of State of Gujarat.

17. The revision, therefore, succeeds in part only and is partly allowed on the point of sentence. The order of conviction recorded by the two Courts below is confirmed. The order of sentence is reduced to 3 month's Simple imprisonment and to pay fine of Rs.1,25,000/-. In case of default in payment of fine the revisionist shall undergo further Simple Imprisonment for a period of one month. The revisionist will surrender before the concerned Court within two weeks from today and shall deposit the fine in the mean time.

sd/-

Date : September 14, 2000 (D. C. Srivastava, J.)

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